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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1932

No. 538

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

REPLY BRIEF FOR PETITIONER

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UNIVERSITY PRINTING

On page 35 of the Defendant's brief it is said that Petitioner "prints—and sells books—as a private publishing house." No syllable of evidence before this court supports this statement. It is doubtless a wholly inadvertant error. The University does, in fact, print some bulletins and reports as does the national government, but most are distributed free. In 1926, according to the evidence in the first case in the Customs Court, the deficit in printing operations was over $90,000 with receipts of only $4,000. We trust Counsel is mistaken if he

means to say that our printing experience parallels that of any "private publishing house."

Certain Administrative Practices

Point is made of the fact that in some instances states have paid duties on merchandise to be used for governmental purposes; and in other instances states have questioned this power but accepted administrative rulings against free importation. The fact that states have paid rather than litigate is not even persuasive on the question of constitutional power, especially in view of the fairly liberal exemptions until the Tariff Act of 1922; and interpretation by the Treasury Department is without significance because, as said by Mr. Moss, (Government Brief, page 62) " . . . . it is not a function of the Department to determine the constitutionality of the tariff act as relating to the importation of merchandise by State Governments, ... " Similarly, Honorable Andrew Mellon (Government Brief, p. 61) points out that the "Department is vested with no discretionary power" in this behalf.

Scientific Instruments Originally Exempt from Duty

The Tariff Act of August 10, 1790, admitted "philosophical apparatus" free when brought in for a semi-

nary of learning. This included scientific instruments, Dr. Johnson's Dictionary of the English Language, Edition of 1786. Section 2, Act of April 27, 1816, exempts certain articles brought in by schools and seminaries. Section 6, Act of May 22, 1824, and Section 3, Act of March 3, 1857, made similar exceptions in favor of schools. Act of July 24, 1897, and Act of August 5, 1909, admitted books, etc., free for schools and seminaries.

On July 25, 1861, Congress directed a refund of duties paid by the states on fire arms imported. S. L. Vol. 12, Chap. 18; Chap. 1, Vol. 12, S. L., p. 255; S. L. Vol. 12, Chap. LI.

In 1899 certain bells for the Iowa Agricultural College at Ames, presented by Edwin M. Stanton, were admitted free. 30 Stat. at large 837, Chap. 157.

It has not been uncommon—prior to 1922—to admit articles for use at State Fairs free. One illustration appears in 31 Stat. at Large 1462, No. 11 Joint Res., February 28, 1901, in behalf of the State of Texas.

The plain fact is that little reason existed for challenging customs duties on behalf of the states until the illiberal—from the standpoint of scientific research—Tariff Act of 1922 was enacted.

The Estoppel Doctrine

We do not know how otherwise to describe the novel argument on page 36 of Defendant's brief than as the "estoppel doctrine." The Solicitor General did not urge it in the oral argument and we infer he does not regard it seriously. No such condition, as this theory implies, is attached in any congressional grant to the gift of lands or money to the states, and from the acceptance of such a gift no waiver of sovereign immunity can be implied. If the argument had any merit, we would have to have a balance struck in every case before this Court could determine whether this constitutional immunity was lost and the power to control schools, health, highways, etc., had passed from the states to the United States in the numerous cases of Federal subsidy.

Bankruptcy

We think the analogy supposed to be furnished by the Bankruptcy Act, and decisions under it, affords no assistance to the Government in this case. We are not aware that this Court has ever decided the question whether Congress has the constitutional power to enact a law discharging an insolvent debtor from his obligation to pay a state tax. Under the present statute this question cannot arise. 30 Stat. at Large 550, Act of

July 1, 1899, C. 541, Section 17. The question of priority between the nation and the states turns on different principles. The power of taxation is concurrent in state and nation and the state power to tax must yield when it comes in conflict with the national power to tax, unless there be an express or implied limitation in the Constitution to the contrary.

The Home Market

The evidence shows without dispute that the equipment imported was not obtainable in the home market. This may be an incident from the technical legal standpoint; nevertheless, when, as has been urged in this case, the purpose of Congress to equalize competition is invoked in behalf of the Government and it is indicated that that purpose is frustrated by the constitutional exemption claimed, it seems entirely proper to advert to this fact. It does not appear to us to be a far fetched argument to urge that the power to regulate foreign commerce does not imply the power to destroy that commerce in legitimate commodities for strictly state use when such stoppage is purely arbitrary and, upon conceded facts, obviously has no connection with the expressed purpose of Congress to encourage domestic industry. In such circumstances the power exerted ap-

pears to us to be arbitrary and the result of the exertion thereof is, as pointed out in the oral argument, to stay the progress of research and to delay, perhaps check entirely, important discoveries which, in the history of our industrial development, always have preceded legitimate commercial exploitation. The researcher must formulate his hypothesis; he must test it; in order to test it he requires instruments frequently which must be made to specification and are often non-existent in commerce. Industries, organized on the basis of profit making, are not prepared to furnish equipment of this kind or to bother with making it. In consequence, scientific institutions must either go without or pay a 45% or a 65% tax to the Government. This, of course, means that the scientific apparatus can not in many cases be obtained.

Such an argument is one properly addressed to Congress. When, however, two interpretations are urged upon the Court, it is entirely proper to call attention to the natural consequence resulting from the adoption of the one or the other construction.

Confusion of Commerce and Taxing Powers

It appears to us that there is in the opinions of the majority below and in the argument for the United

States, a confusion of thought in a matter essential to a sound conclusion. There are numberless regulations of foreign commerce which are achieved through the exertion of that specific grant; there are likewise numerous and important regulations of commerce which come about indirectly through the exertion of the specifically granted power to tax; and there is still another type of regulation of commerce accomplished through the exercise of other granted powers, such as the war power, the treaty making power, etc. The system of protection of home industry by means of tariff duties is fundamentally nothing more than the selection of the objects—articles—of taxation, with amounts of duties and selection so arranged as, at the same time, to benefit domestic industry by equalizing the competition of articles produced abroad at lower cost. Congress, having full power to select the objects of the tax, has the discretion to make the choice on any basis it sees fit. Congress may thus, in fact, use the taxing power as a means of effectually regulating foreign commerce, but the power exerted still is the power to tax. This is exactly what Taft, C. J., means in Hampton Co. v. United States, 276 U. S. 394, and Marshall, C. J., in Gibbons v. Ogden, 9 Wheat. 1. The motives which impel exercise of a power can not override the constitu-

tional purpose of the act. Ellis v. United States, 206 U. S. 246, Stephenson v. Binford 53 Supreme Court Rep. 18 (December 1932).

Counsel and the majority of the lower court overlook or ignore:

1. That the implied limitation (Petitioner's Brief, pages 16-18) is "Derived from the constitution in the same sense and upon the same principles that it would be if expressed in so many words" (Clallam County v. United States Spruce Corporation, 263 U. S. 341, 344); that is, to all intents and purposes, it is an *express limitation*;

2. That the paragraphs, the application of which is challenged in this case (Petitioner's Brief, pp. 32-33), are in fact, intent, and upon their face, purely tax provisions and cannot be regarded as regulations of commerce otherwise than indirectly and incidentally in the constitutional sense (R. pp. 108-111);

3. That there are numerous provisions in the Tariff Act of 1922 which are purely regulations of Commerce and, therefore, support the statement of purpose in the title to that effect;

4. That this Court, in Hampton Company v. United States, 276 U. S. 394, Petitioner's Brief, pp. 18-20, holds

that the Tariff Act of 1922 is a revenue measure in the constitutional sense. Indeed, the opinion in that case seems to us wholly predicated on the conclusion that the law is a "revenue act" (Petitioner's Brief, p. 19, R. p. 106);

5. That the "commerce" which Congress may regulate was historically not supposed to embrace the isolated transactions where individual states acquired property for strictly governmental use, but was supposed to be "limited to . . . . commerce . . . . between citizens of the United States and citizens and subjects of foreign nations . . . . ." United States v. Steffens, 100 U. S. 82, 96, in which the quoted language is copied verbatim, but without citation, from United States v. Holliday, 3 Wall. 407 (1865);

6. That Buttfield v. Stranahan, 192 U. S. 470, Brolan v. United States 236 U. S. 216, Weber v. Freed 239 U. S. 325, etc. (Government Brief, pp. 11-12), are not controlling concerning the power of Congress under the *commerce clause* to exclude commodities, concededly harmless, from foreign commerce—a question not involved in this case—although Chief Justice White used some sweeping language, possibly going to the extreme verge of what the factual situation or the question be-

fore the Court strictly required, because they are "police power" cases (Brooks v. United States 267 U. S. 432, 436), dealing with commodities in themselves possibly harmful or dangerous (i.e., sponges, opium, oysters, etc.). In Hammer v. Dagenhart, 247 U. S. 251 this Court says that "the cases demonstrate the contrary" of the proposition that Congress, under the *commerce* clause, may prohibit the movement of "ordinary commodities" in commerce. We think this question is not here. See Brief for Petitioner, pp. 21-23, also Petitioner's Brief in support of petition for certiorari, pp. 14-15.

7. That Veazie Bank v. Fenno and Head Money cases (Brief for the United States, p. 15, 28) and United States v. Turner (Brief for the United States, p. 29) support the Petitioner's position concerning the essential distinction between the power to tax and that to regulate commerce.

Congress has occasionally levied exactions, in form taxes, which have been sustained against attack as suitable and proper means for the effective execution of express powers. Of this type was the per capita tax sustained in the Head Money Cases, 112 U. S. 580, which was a genuine regulation of commerce in the form of a tax, and Veazie Bank v. Fenno, 8 Wall. 533,

where a tax of 10% on the circulation of State Banks was, in primary purpose and effect, a regulation of the currency, although in form a tax. In each of these cases the taxing power was not exerted, but another and express power to the efficient exertion of which means were deemed appropriate which in appearance but not in essential character in a constitutional sense, suggested the exercise of the power to tax. On a somewhat similar principle, it has not been uncommon for the States to levy a stated tax on oil and gasoline brought into the State, but in such a manner that under the local constitution it would be invalid as an exercise of the State's taxing power. The exaction has been sustained on the theory that, notwithstanding the name used, the tax was imposed in the valid exercise of the State's police power.

Is it to be implied that the states, in surrendering control over foreign commerce to the new government, intended also by that clause to extend the power to tax, granted in other parts of the instrument and subject to clear limitations, both express and implied, so as to empower Congress to tax property acquired abroad by the states for the sole purpose of carrying on a strictly governmental activity? The tariff act is ostensibly enacted pursuant to the clause giving Congress power to

levy taxes, and not pursuant to the commerce power. Hampton Company v. United States, supra, Gibbons v. Ogden, supra, State Tonnage Tax Cases, 12 Wall. 204.

Assume this Court finds, contrary to the conclusion in Hampton Company v. United States, that the Tariff Act of 1922 was *ostensibly* enacted under the power to regulate commerce; yet, if, in reality, the exaction challenged be "not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within the power reserved to the states," the exaction should be condemned. Linder v. United States, 268 U. S. 15, and numerous other decisions of this Court.

Whatever regulatory purpose Congress may have had in view in enacting the four paragraphs challenged in this case (Petitioner's Brief, pp. 32-33), "must be reached only through a revenue measure and within the limits of a revenue measure." United States v. Jin Fuey Moy 241 U. S. 394, 402, quoted in Linder v. United States supra, p. 17.

The customs duty is obviously not laid for a regulative purpose, under the commerce clause, so that it can be regarded as a tax in form only. If the duty collected and here protested were held to be a purely regulatory

measure, though in form a tax, the result would be that tariff acts could with equal propriety originate in the Senate, thereby reversing the practice of one hundred forty years, and the duties need not be uniform (Petitioner's Brief, p. 20).

No Power to Tax under Commerce Clause

It seems to us inescapable that if the paragraphs challenged are sustained as commerce regulations, applicable to the Petitioner, Congress may levy a tax on exports in spite of the prohibition of the Constitution. The implied limitation upon the power of Congress to tax state instrumentalities has been said by this Court to be "derived from the Constitution in the same sense and upon the same principle that it would be if expressed in so many words," Clallam County v. United States, etc., 263 U. S. 341, 344. That is, to all intents and purposes, it is as effective as if it were an express reservation of power. Therefore, if Congress enacts a law entitled "An Act to Regulate Foreign Commerce," and imposes a duty on all exports and seeks to escape the effect of the prohibition and the decisions of the Court by claiming that it is exercising the power over commerce, on the theory of the Government in this case the tax on exports would have to be sustained as an exertion of the power

to regulate foreign commerce. Of course, this Court would not be bound by the name Congress might give its purpose; it would not permit Congress thus to evade what was one of the objectives of the Constitution, namely, to prevent the taxation of exports from the states. Yet, it seems to us that a tax on exports could be sustained under the commerce clause if a tax on imports, may, as here claimed, be sustained thereunder.

An Act of Congress may, and often does, contain provisions sustainable only by reference to two or more divergent sections of the Constitution. It is our contention that the Tariff Act of 1922 illustrates this proposition. Some parts are enacted under the power to regulate commerce; others under the power to tax; and still others under the commerce and perhaps the treaty making power. A notable illustration is the Sherman Anti-Trust Law, especially Sections 1 and 3. In Atlantic Cleaners and Dyers v. United States, 52 Supreme Court p. 607, 609, it is pointed out that Section 1 is enacted under and limited by the scope of the commerce clause; while Section 3 is sustainable only by reference to the express power to legislate for the District of Columbia. This recent decision supports by analogy our contention that the portions of the act here challenged

must be limited by and must derive their vitality from the grant of the power to levy import duties—to tax.

Power to Exclude Commodities from Foreign Commerce

In the case at bar it is not claimed by any one that the tax challenged can be sustained under any other power other than that over commerce or over taxation. That is, there is no contention that the tax challenged can be upheld as an exercise of the war power, the treaty making power, the power to deal with foreign nations, or of a totality of these or other powers.

While we have consistently maintained that there is no question in the case concerning the extent of the power of Congress, under the commerce clause, to exclude commodities from foreign commerce, we deem ourselves forced to notice the position taken by the Government on this point. The question is interesting, if not pertinent; and we respectfully suggest that it is not so one-sided as the Government or amici curiae seem to regard it.

The leading recent case on the power of Congress over interstate commerce is Hammer v. Dagenhart, 247 U. S. 251. As the petitioner interprets this decision, the doctrine is definitely established that Congress has no

power to exclude a commodity from interstate commerce without regard to the intrinsic character of the commodity or of the circumstances of use or production. Such an exercise of power this Court, it now seems, will not sustain unless and until it is prepared to hold that the right to engage in interstate commerce owes its existence to the Constitution or to Federal law, and it is not merely a right preserved by the Constitution against interference or control by the States. It seems, however, that this Court cannot arrive at such a conclusion without holding that the system of interstate transportation is an instrumentality of the National Government in substantially the same sense as the National banks and the postal system. Speaking always with reference to the commerce clause, the same observations would seem to apply to foreign commerce.

Before the Constitution, interstate and foreign commerce were equally free from control by any agency other than the individual states. The right of a state to buy and import merchandise from abroad for use in the performance of strictly governmental functions existed and was exercised long before 1789. This right of importation is, therefore, in no sense a creature of the Constitution or of Federal laws. The Constitution or con-

stitutional legislation may have restricted that pre-existing rignt, but neither created or augmented it.

The power to regulate commerce, under Section 8, Article II, paragraph 3, was given Congress "to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture," said this Court in Hammer v. Dagenhart. We think that this language should be applied to the power over foreign commerce, granted in the same clause, and that it is not the intent of the Constitution that this power may be so exerted as to control the States in their exercise of governmental functions by forcing them to purchase their governmental instrumentalities in the markets of some state or states, or go without as in the case at bar, or else pay an extravagantly large and onerous tax to the National Government. We suggest, on this point, that the language of Chief Justice Marshall is entirely pat when he said, in Sturgis v. Crowninshield, 4 Wheat 122, that the powers not granted proceed "not from the people of America, but from the people of the several states; and remain, after the adoption of the Constitution, what they were before except as far as they may be abridged by that instrument." The pre-existing right of a state

to import, as stated, was not abridged by a gift to Congress of a power *under the commerce clause* to tax the property imported when directly associated with the performance of a strictly governmental function. The purpose was to free commerce, not to transfer to the new government the powers of restriction or prohibition theretofore exercised by some states to the annoyance of others.

Brief of Amici Curiae

No attempt is made in the brief of Amici Curiae to discriminate concerning the real and rather narrow issue in this case and the circumstances in which Congress may, under the commerce power and other powers in conjunction with it, prohibit importation. Amici Curiae ignore the fact that Congress does not prohibit but taxes in the paragraphs challenged. No new arguments are advanced and our discussion of the position of the Government is equally applicable here.

We are impressed by the concluding paragraph of the brief of Amici Curiae, and we are reminded of the spirit of the delegates from the states of Pennsylvania and New Jersey in the Constitutional Convention of 1787. We suggest that roads are also built in New York, in Illinois, in California, in Iowa, and in all the twelve states which have supported Illinois in this struggle to

free scientific research and progress from the bonds of unenlightened selfishness. These last named states understand that the spirit of research goes far in advance of the procession of profitable business progress and do not anticipate ruin to any one through the importation of scientific instruments or of "road-building materials" by the states; and we are persuaded that their legal representatives are as conscientious as we should presume public servants to be. Of them we feel confident it could not be either facetiously or seriously said: "The voice is Jacob's voice, but the hands are the hands of Esau."

Respectfully submitted,

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Since printing the main brief, the following Attorneys General have signified their concurrence in the legal position taken by Illinois in this contest, in addition to those whose names appear on the main brief.

U. S. WEBB, California
GREEK L. RICE, Mississippi
RAYMOND NAGLE, Montana
PAUL F. GOOD, Nebraska
EDWARD L. O'CONNOR, Iowa